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No. 99-411

In The

Supreme Court of the United States

THE BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY,

Petitioner,

vs.

THEODORE WICHMANN

AND

UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO RESPONDENT WICHMANN'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

I. Argument 1

A. Wichmann's Argument That SIU Waived Its Right To Assert Eleventh Amendment Immunity Is Procedurally Barred 1

B. A Party May Wait Until After Trial To Appeal The Pretrial Denial Of A Sovereign Immunity Defense 2

II. Conclusion 5

TABLE OF AUTHORITIES

Page

Federal Cases

Fletcher v. United States, 116 F.3d 1315 (10th Cir. 1997) 3

Goff v. Bise, 173 F.3d 1068 (8th Cir. 1999) 3

Hamm v. Powell, 874 F.2d 766 (11th Cir. 1989), *cert. denied*, 496 U.S. 938 (1990) 3

Harmon Industries v. Browner, ___ F.3d ___, Case No. 98-3775, 1999 WL 718443 (8th Cir. 1999) 5

Hill v. Blind Industries and Services of Maryland, 179 F.3d 754 (9th Cir. 1999) 4, 5

Kimel v. State of Florida Bd. of Regents, 139 F.3d 1426 (11th Cir.), *rehearing en banc denied*, 157 F.3d 908 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (U.S. Jan. 25, 1999) 5

Matherne v. Wilson, 851 F.2d 752 (5th Cir. 1988) 3

Mitchell v. Forsyth, 472 U.S. 511 (1985) 3

Sutton v. Utah State School for the Deaf and Blind, 173 F.3d 1226 (10th Cir. 1999) 5

Wichmann v. Board of Trustees of Southern Illinois University, 180 F.3d 791 (7th Cir. 1999) 5

Rules

Rules of the Supreme Court of the United States, Rule 15(2) 2

REPLY TO RESPONDENT WICHMANN'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner The Board of Trustees of Southern Illinois University ("SIU") submits its Reply Brief to Respondent Theodore Wichmann's ("Wichmann") Brief in Opposition to SIU's Petition for a Writ of Certiorari.[1] Wichmann argues that SIU waived its Eleventh Amendment sovereign immunity defense by not taking an interlocutory appeal from the district court's pretrial denial of that defense. This argument should fail. First, Wichmann's waiver argument is procedurally barred because it seeks review of a new point of law not addressed in SIU's Petition. Second, the argument fails on the merits, as courts have allowed a party to wait until after trial to appeal a pretrial denial of an immunity defense.

I. ARGUMENT

A. Wichmann's Argument That SIU Waived Its Right To Assert Eleventh Amendment Immunity Is Procedurally Barred.

SIU's petition for a writ of certiorari raises only the issue of whether Congress validly abrogated the States' Eleventh Amendment sovereign immunity from suit under the ADEA. Wichmann's response seeks to present for review an additional legal issue, *i.e.*, whether SIU is barred from asserting sovereign immunity because it did not file an interlocutory appeal from the district court's

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[1] As the Brief of The United States does not raise new matters, no reply thereto is necessary or appropriate.

pretrial denial of that defense. Wichmann concedes that this additional legal issue was not addressed by SIU, stating in its questions presented that the issue is *"[i]n addition* to the question contained in the Petition." Respondent's Brief at p. i (emphasis added).

Wichmann's argument is procedurally barred as it places a new question of law before this Court. Pursuant to Rule 15(2) of the Rules of the Supreme Court of the United States, a brief in opposition to a petition for a writ of certiorari should "address arguments for denying the petition" and "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Therefore, Wichmann may properly address the legal and factual contentions raised by SIU in its petition for a writ of certiorari. However, the Rules of the Supreme Court do not permit Wichmann to raise a completely new issue of law for this Court's review in his opposition brief. For this reason, Wichmann's argument that SIU waived its Eleventh Amendment immunity is procedurally barred, and should not be considered by this Court in its ruling on SIU's petition for a writ of certiorari.

B. A Party May Wait Until After Trial To Appeal The Pretrial Denial Of A Sovereign Immunity Defense.

Even if Wichmann's waiver argument were properly before this Court, the argument fails on the merits. The courts are unanimous in their conclusion that a party does not waive an immunity defense by not taking a

permissive interlocutory appeal of a pretrial denial of such a defense.

The Tenth Circuit expressly rejected the waiver argument Wichmann makes in *Fletcher v. United States*, 116 F.3d 1315, 1325 (10th Cir. 1997), concluding that the "failure to take an interlocutory appeal under the section does not waive sovereign immunity." This point was also made clear in *Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988), where the court concluded that the defendant had not waived a qualified immunity defense by not taking an interlocutory appeal, reasoning:

> We are not persuaded that the exception that *Mitchell v. Forsyth*, 472 U.S. 511 (1985) carved from the finality of judgment rule was intended to override the general doctrine of appealability. There may be good reasons why a defendant may elect to not appeal before trial, and we see little value in a rule of waiver that would force unwanted appeals, many of which undoubtedly never would have been necessary. In short, the right to appeal before trial belongs to a defendant, protecting him from money damages as well as from the costs of defending a suit. We see no reason to force pretrial appeals.

Id. at 755. *See also Hamm v. Powell*, 874 F.2d 766, 770 (11th Cir. 1989), *cert. denied*, 496 U.S. 938 (1990) (holding that "[t]he defense of qualified immunity is not waived if an official chooses not to take an immediate appeal from the denial of a motion for summary judgment"); *Goff v. Bise*, 173 F.3d 1068, 1071 (8th Cir. 1999) (holding that "a district court's denial of summary judgment based on qualified immunity is an exception, and is reviewable after a trial on the merits").

Wichmann's citation to *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754 (9th Cir. 1999) in support of a contrary conclusion is misplaced as *Hill* does not address the waiver issue raised by Wichmann in this case. *Hill* simply does not address whether a party's failure to take an interlocutory appeal of a pretrial denial of a sovereign immunity defense waives the defense and precludes a post trial appeal of the denial. Rather, the *Hill* court considered whether a defendant who waited "until the first day of trial before objecting to the federal court's jurisdiction on Eleventh Amendment grounds" waived its immunity defense. *Hill* at 756. The *Hill* court concluded that this delay could create "the opportunity for improper manipulation of the judicial process," and thus found that the defendant had waived its immunity claim. *Id.* at 758.

Unlike *Hill*, SIU has maintained its right to Eleventh Amendment immunity from the beginning of the proceedings, thereby giving "timely disclosure" and "fair warning to the plaintiff." *Id.* at 758. Unlike the defendant in *Hill*, SIU promptly asserted its immunity claim to the court and opposing counsel, allowing them sufficient time to consider this argument. Thus, the Ninth Circuit's decision in *Hill* is irrelevant to the issue of whether SIU's decision not to take an interlocutory appeal of the district court pretrial denial of its Eleventh Amendment sovereign immunity defense waived its defense and right to a pretrial appeal of the issue. Rather, the cases on this point uniformly conclude that the decision not to appeal pretrial denial of an immunity defense until after trial does not waive that defense.

SIU also questions the correctness of the Ninth Circuit's decision on the issue presented in *Hill*. Unlike the

Ninth Circuit's conclusion in *Hill*, other courts, including the Seventh Circuit below, have concluded that an Eleventh Amendment immunity defense may be raised at any point, including for the first time on appeal. *Wichmann v. Board of Trustees of Southern Illinois University*, 180 F.3d 791, 797 (7th Cir. 1999) (noting that "[s]tate sovereign immunity . . . may be raised by the State for the first time on appeal"). *Accord, Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1231 (10th Cir. 1999); *Harmon Industries v. Browner*, ___ F.3d ___, Case No. 98-3775, 1999 WL 718443, at *8 (8th Cir. 1999).

II. CONCLUSION

For the foregoing reasons, this Court should reject Wichmann's arguments and grant SIU's Petition for a Writ of Certiorari, and/or should hold SIU's Petition pending this Court's decision in *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir.), *rehearing en banc denied*, 157 F.3d 908 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (U.S. Jan. 25, 1999), and dispose of SIU's petition in accordance with this Court's decision therein.

Respectfully submitted,

The Board of Trustees of Southern Illinois University

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